Supreme Court, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

ERNEST BROWN,

Petitioner,

v.

WILLIAM M. PLAUT,
ASSOCIATE DIRECTOR FOR INSTITUTIONS
OF THE DISTRICT OF COLUMBIA
DEPARTMENT OF CORRECTIONS, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Under *Sandin v. Conner*, 515 U.S. 472, 487 (1995), do prison rules create a constitutionally-protected liberty interest against administrative segregation if this confinement is (a) significantly more restrictive than housing in the general prison population; and (b) atypical, because neither it nor any similarly-restrictive confinement may be imposed on a discretionary basis?

2. In prison administrative segregation cases involving a constitutionally-protected liberty interest, does determination of whether *Wolff v. McDonnell*, 418 U.S. 539 (1974), or *Hewitt v. Helms*, 459 U.S. 460 (1983), prescribes the process due depend on whether (1) the reason for the segregation is a finding of "serious misbehavior"; and (2) segregation imposed for this reason "can postpone . . . the actual date of parole," though "it is not certain to do so"? *Wolff*, 418 U.S. at 571 n. 19 and 561.

PARTIES BELOW

The parties to the proceeding in the U.S. Court of Appeals for the District of Columbia Circuit were Ernest Brown, plaintiff-appellant, and Bernard L. Braxton, D. Pullen, William Schroeder, Arralean Ellis, and the District of Columbia, defendants-appellees.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit appears in the appendix ("App.") at 1a-19a and is reported at 131 F.3d 163. It is the only reported opinion. The district court's unreported opinion dismissing petitioner's first amended complaint appears at App. 24a-29a. The district court's unreported opinion dismissing petitioner's second amended complaint appears at App. 22a-23a.

JURISDICTION

The judgment of the court of appeals was entered December 16, 1997. The court's order denying rehearing was entered on February 9, 1998. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS

The applicable provisions, set forth in the appendix, App. 34a-40a, are the Due Process Clause, U.S. Const. amend. V; 42 U.S.C. §1983; and numerous legislatively-approved District of Columbia prison rules published in title 28, District of Columbia Municipal Regulations (DCMR).

STATEMENT OF THE CASE

Petitioner Brown, a medium-custody District of Columbia prisoner, filed in the district court a suit for damages under 42 U.S.C. § 1983. The court had jurisdiction under 28 U.S.C. §§ 1331 and 1343(a)(3). Brown claims that prison officials violated his Fifth Amendment due process rights provided by *Wolff v. McDonnell*, 418 U.S. 539 (1974), when they transferred him from a medium custody dormitory facility in

Lorton, Virginia to restrictive confinement in administrative segregation in a cell of the Lorton Maximum Security Facility.

The district court dismissed Brown's due process claim, holding that, under *Sandin v. Conner*, 515 U.S. 472 (1995), the applicable prison rules do not create a constitutionally-protected liberty interest against confinement in administrative segregation.

The court of appeals declined to decide the *Sandin* issue. It said that *Sandin* was "not clear," that its application to the facts "presents a number of difficulties" and "unsettled questions," that the analysis in case law from the Second and Ninth Circuits has not been adopted by the Fifth Circuit, and that the Seventh Circuit has said that it would "welcome clarification" by the Supreme Court. App. 12a-13a, *quoting Wagner v. Hanks*, 128 F.3d 1173, 1176 (7th Cir. 1997).

Instead of deciding the *Sandin* issue, the court of appeals held that *Hewitt v. Helms*, 459 U.S. 460 (1983), not *Wolff*, prescribed the process due and that the district court should decide first whether prison officials had complied with *Hewitt*. If the answer was no, then the district court should decide the *Sandin* issue anew, "in light of the questions identified in [the appellate court's] opinion." App. 18a-19a.

Facts

The facts giving rise to Brown's due process claim are set forth in detail in paragraphs 12-22 of his second amended complaint. App. 46a-51a. Brown claims two violations of *Wolff v. McDonnell*, 418 U.S. 539 (1974).

First, Brown claims that, while the written decision placing him in administrative segregation said he had assaulted an officer, the decision identified no evidence to support this

conclusion. App. 48a. Instead, the decision said only that there had been an "alleged incident involving correctional staff." *Id.* This failure to provide written evidentiary findings violated *Wolff.* 418 U.S. 563-564 and 571, n. 19 (1974) (where specific requirements apply to "a major change in the conditions of confinement . . . normally imposed only when it is claimed and proved that there has been a major act of misconduct," prison decisions imposing the change must be supported by written evidentiary findings).

Brown also claims that prison officials afforded him no advance notice that he was accused of assaulting an officer. App. 46a-48a. Brown went to the prison hearing on notice that he was accused of the minor offense of threatening conduct, for words he allegedly had uttered; but, instead, he was found guilty of the major offense of assaulting an officer. This, too, was a clear violation of *Wolff.* 418 U.S. at 563 (requiring "advance written notice of the claimed violation").

Like the state provisions in *Wolff,* the Lorton prison rules prohibit imposition of administrative segregation in the absence of specified substantive findings. 28 DCMR § 521.4 (1987). In Brown's case, the rules required a finding that he posed "a clear and present threat to the safety of others." § 521.4(b). Brown claims that this substantive requirement creates a constitutionally-protected liberty interest against confinement in administrative segregation since (1) this confinement is far more restrictive than housing in the general population of a Lorton medium security dormitory facility, App. 49a-50a;[1] (2) the prison rules prohibit officials from

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[1] The court of appeals already had so found, in a prior case. *Crosby-Bey v. District of Columbia,* 786 F.2d 1182, 1183 (D.C. Cir. 1986) ("[b]oth disciplinary segregation and administrative segregation involve a substantial loss of liberty for the prisoner").

imposing any similarly restrictive confinement on a discretionary basis. Under the rules, any restrictive confinement in a maximum security cell is either disciplinary or administrative segregation. §§ 505.2, 521.3. This segregation may not be imposed unless a specific substantive standard is met.[2]

Brown claims that administrative segregation for assaulting an officer is likely to adversely affect parole consideration, and that in fact the segregation and assault finding substantially motivated his subsequent denial of parole. App. 50a-51a.

District Court Decision

The district court dismissed Brown's due process claim based on a single conclusion of law--the court's view that "given the standard established in" *Sandin v. Conner*, 115 S. Ct. 2293 (1995), the Lorton rules "do[] not create a liberty interest for the purposes of ensuring an inmate due process protection in instances of administrative segregation." App. 14, 35.

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[2] Involuntary protective custody may be imposed only where "factual information" shows a "clear and present threat to the resident's safety." §§ 526.1 and 520.4. Prisoners in voluntary protective custody have the right to immediate release on demand. § 521.12. Other types of administrative segregation may be imposed only if factual information establishes one of two other circumstances ("definite escape risk" or "clear and present danger to the safety of others"). §§ 520.2, 520.3. Disciplinary segregation may be imposed only if factual information demonstrates that a prisoner has committed a specific disciplinary offense. § 500.

Court of Appeals Opinion

The court of appeals declined to decide the *Sandin* question. Instead, the court held that *Hewitt v. Helms*, 459 U.S. 460 (1983), not *Wolff v. McDonnell*, 418 U.S. 539 (1974), prescribed the process due. The court remanded the case for determination of whether *Hewitt*'s minimal requirements had been met. The court reasoned that *Wolff* applies only to segregation that is disciplinary "in nature," while *Hewitt* applies to all administrative segregation, unless a prisoner shows either (1) that the administrative segregation later "was treated for parole purposes as equivalent to a disciplinary finding," or (2) "that administrative segregation was so widely used as a substitute for punishment that it carried the same stigma as disciplinary segregation." App. 15a.

REASONS FOR GRANTING THE WRIT

This case presents the same *Sandin* issue as the companion case, *Neal v. District of Columbia*; the Court should resolve this unsettled question, on which the circuits are divided.

The court below correctly noted that the courts of appeals have divided on the issue presented here:

> Caselaw from the Second and Ninth Circuits suggests that whether a term in segregation amounts to an "atypical and significant" deprivation turns on its length and on a comparison of conditions in segregation and in the prison's general population. *See, e.g., Brooks v. DiFasi*, 112 F.3d 46, 48-49 (2d Cir. 1997); *Keenan v. Hall*, 83 F.3d 1083, 1089 (9th Cir. 1996). Other courts have not adopted so structured an analysis; for instance, the Fifth Circuit has concluded that a term in administrative segregation was not

> "atypical and significant" without discussing conditions in the segregation unit or the length of the segregation at all. *See Luken v. Scott*, 71 F.3d 192, 193 (5th Cir. 1995), *cert. denied*, 116 S. Ct. 1690 (1996). Were we to follow the approach of the Second and Ninth Circuits, we would then need to decide whether the length and severity of the deprivation Brown experienced sufficed to render that deprivation "atypical and significant," a close and difficult question. *Compare Sealey v. Giltner*, 116 F.3d 47, 51-52 (2d Cir. 1997) (remanding for specific findings on conditions of confinement in the case of an inmate held in administrative segregation for six months) with *Mackey v. Dyke*, 111 F.3d 460, 463 (6th Cir.), *cert. denied*, 139 L. Ed. 2d 84, 118 S. Ct. 136 (1997) (finding that a six-month term in administrative segregation was not "atypical and significant," with no discussion of conditions in segregation).

App. 13a-14a.

The Court should resolve this conflict among the circuits by applying the analysis set forth in *Sandin*. There, the Court held that a prisoner in Hawaii did not have a constitutionally-protected liberty interest against confinement in disciplinary segregation because, under Hawaii law, disciplinary segregation was not an "atypical, significant deprivation" of liberty. 515 U.S. at 486. The Court based this holding on two findings.

First, disciplinary segregation in Hawaii "mirrored those conditions imposed upon inmates in administrative segregation and protective custody." *Id.* Second, under Hawaii law, imposition of administrative segregation or protective custody was "totally discretionary." *Id.* Thus, since disciplinary segregation in Hawaii prisons "did not exceed similar, totally discretionary confinement," *id.*, the

Hawaii regulations on disciplinary segregation were "not designed to confer rights on inmates." *Id.* at 482.[3]

The rule adopted in *Sandin* compares challenged confinement to conditions prevailing in the most restrictive type of confinement that prison officials lawfully may impose in exercise of unfettered discretion. Under the Hawaii regulations in *Sandin* the most restrictive but totally discretionary confinement that prison officials could impose was administrative segregation and protective custody. Therefore, conditions in administrative segregation and protective custody were the proper bases for comparison. Since disciplinary segregation in Hawaii "mirrored" and did not "exceed" to any significant degree the restrictiveness of administrative segregation and protective custody, the *Sandin* Court held that Hawaii regulations defining circumstances warranting disciplinary segregation created no liberty interest, because prison officials could impose the same degree of confinement, though under different names, through exercise of unfettered discretion. *Id.* at 486.

Sandin was a straightforward application of the holding and reasoning of *Meachum v. Fano*, 427 U.S. 215, 228 n.4 (1976) (no liberty interest against prison transfer where "no ... law stripped officials of the discretion to transfer prisoners ... 'for whatever reason or for no reason at all' "). 515 U.S. 478-

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[3] The *Sandin* holding was not based on comparison of the degree of confinement in disciplinary segregation to that in the general population in Hawaii prisons. Though the Court mentioned general population conditions, 515 U.S. 486 n.8, the Court's holding was that there could be no liberty interest against imposition of disciplinary segregation where this segregation "mirrored" and did not "exceed" to *any* significant degree "totally discretionary" administrative segregation and "totally discretionary" protective custody.

79. While following *Meachum*, *Sandin* expressly reaffirmed *Wolff v. McDonnell*, 418 U.S. 539, 557 (1974) (state law created liberty interest against imposition of prison discipline revoking prison good time credits, where credits "were revocable *only* if the prisoner was guilty of serious misconduct") (emphasis added). 515 U.S. 477-78.[4]

The prison rules here are like the state statutes in *Wolff*, not the provisions in *Meachum* or *Sandin*. Unlike the Hawaii regulations in *Sandin*, the rules here do *not* allow Lorton officials to impose *either* disciplinary segregation, administrative segregation, *or* protective custody on a "totally discretionary" basis. Under the Lorton rules *none* of these types of restrictive confinement may be imposed unless a specific substantive standard is met.[5] In contrast to the finding in *Sandin* that Hawaii regulations did not confer rights on prisoners, the District of Columbia Court of Appeals consistently has held that the Lorton rules do confer rights on Lorton prisoners. *Abdullah v. Roach*, 668 A.2d 801 (D.C. 1995); *Vaughn v. United States*, 598 A.2d 425 (D.C. 1991). In *Abdullah*, moreover, the court expressly observed that the District of Columbia "may be reading *Sandin* too broadly." 668 A.2d at 809.

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[4] The facts and holding in *Sandin* were similar to those in *Abbott v. McCotter*, 13 F.3d 1439 (10th Cir. 1994), where, as in *Sandin*, restrictive confinement identical to that challenged could be imposed on a totally discretionary basis. The *Abbott* court, a year before *Sandin*, reached the same conclusion announced in *Sandin*--prison regulations cannot create a liberty interest against a particular kind of confinement where equally restrictive conditions can be imposed on a totally discretionary basis.

[5] See n. 2, *supra*.

Since Lorton officials may remove prisoners from the general prison population *only* where a specific substantive standard is met, the proper base of comparison under the *Sandin* rule--to determine whether the Lorton prison rules create liberty interests against administrative or disciplinary segregation--is the restrictiveness of confinement in the Lorton general population.[6] Under the *Sandin* rule the question here is whether administrative segregation "mirrors" and does not "exceed" conditions of confinement for the general prison population.[7]

At Lorton, confinement in disciplinary or administrative segregation clearly "exceeds" and does not "mirror" the restrictivness of conditions in the general prison population. *Crosby-Bey v. District of Columbia*, 786 F.2d 1182, 1183 (D.C. Cir. 1986) ("[b]oth disciplinary segregation and administrative segregation involve a substantial loss of liberty for the prisoner"). The complaint also pleads a significant deprivation of liberty. App. 49a-50a.

Several post-*Sandin* decisions support the validity of petitioner's due process claim. *Brooks v. DiFasi*, 112 F.3d 46 (2d Cir. 1997) (confinement exceeding totally discretionary

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[6] The court in *Abdullah*, 668 A.2d at 809, n. 13, noted this point.

[7] Even Lorton officials' discretion to house prisoners within the general population is not totally unfettered. Lorton prisoners have an enforceable right to proper custody classification to determine in *which* general population they should be housed--the minimum, medium, or maximum custody population. *Verrett v. Stempson*, 623 A.2d 120 (D.C. 1993).

confinement and imposing a significant hardship requires due process); *Miller v. Selsky*, 111 F.3d 7 (2d Cir. 1997) ("*Sandin* did not create blanket rule that disciplinary confinement may never implicate a liberty interest"); *Keenan v. Hall*, 83 F.3d 1083 (9th Cir. 1996) (*Sandin* requires due process where there is a major difference between segregation and housing in the general population); *Whitford v. Boglino*, 63 F.3d 527 (7th Cir. 1995) ("*Sandin* implies that states may grant prisoners liberty interests in being in the general population ... if the conditions of confinement in segregation are significantly more restrictive that those in the general population"); *Thomas v. Newkirk*, 905 F. Supp. 580 (N.D. Ind. 1995) (denying motion to dismiss due process challenge to disciplinary segregation; under *Sandin*, prison regulations may create liberty interest against even a short period of disciplinary or administrative segregation; where "regulation proscrib[es] segregation absent specified predicates" whether segregation is atypical and significant hardship depends on "evidence as to the conditions of the various types of segregation [and] that of the general population"); *Lee v. Coughlin*, 902 F. Supp. 424 (S.D.N.Y. 1995) (awarding summary judgment and damages to prisoner held in lengthy administrative segregation on assault finding reached in violation of due process; under *Sandin*, regulations created liberty interest). Under these precedents, and a proper analysis of *Sandin*, the Lorton prison rules create a liberty interest against confinement in administrative segregation.

The lower court's holding that *Hewitt*, not *Wolff*, prescribes the process due is contrary to *Wolff* and also conflicts with *Sandin*.

In *Sandin* the Court rejected the argument that prison segregation requires constitutionally-prescribed procedures merely because the segregation is labeled disciplinary rather than administrative. 515 U.S. 486. The Court held that the

relevant concerns were the duration, degree, and tangible consequences of segregation, not the label or stigma attached to it.

The court of appeals erred in holding that that *Wolff* applies only to segregation that is disciplinary "in nature," while *Hewitt* applies to all administrative segregation, unless a prisoner shows either (1) that the administrative segregation later "was treated for parole purposes as equivalent to a disciplinary finding," or (2) "that administrative segregation was so widely used as a substitute for punishment that it carried the same stigma as disciplinary segregation." App. 15a. The court's first criterion is unusable, since the process to be afforded must be determined before it is known how the segregation later "was treated" by the parole board. The second criterion is inconsistent with *Sandin*, since it is based on the stigma of discipline alone.

Contrary to the opinion below, *Wolff*, applies whenever (1) the reason for prison segregation is a finding of "serious misbehavior"; and (2) segregation imposed for this reason "can postpone ... the actual date of parole," though "it is not certain to do so." *Wolff*, 418 U.S. at 571 n. 19 and 561.[8] The complaint pleads a finding of serious misbehavior, assault on an officer, with likely adverse effect on parole. App. 48a, 50a-51a. *Wolff* therefore applies.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[8] In *Sandin* the Court held that due process protections are not required solely because of a possible impact on parole consideration, if the "chance that a finding of misconduct will alter the balance is . . . too attenuated." 515 U.S. 487.

Respectfully submitted,

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